

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE E. CORDERO and U.S. POSTAL SERVICE,
POST OFFICE, Lake Elsinore, CA

*Docket No. 99-377; Submitted on the Record;
Issued October 10, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that he refused suitable work; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

Appellant, then a 40-year-old distribution clerk, filed a traumatic injury claim alleging that on February 22, 1989 he injured his right arm, knee and foot in the performance of duty. The Office accepted his claim for a right knee and foot sprain. Appellant returned to light-duty work on a full-time basis on March 1, 1989 following his injury. On April 17, 1992 he filed a second traumatic injury claim alleging a work-related injury to his right knee. Appellant was evaluated for a right knee and ankle injury and the Office accepted that appellant sustained a right ankle contusion, which had resolved. He did not miss work as a result of this injury. On October 23, 1993 appellant injured his right ankle at work, which was accepted by the Office for a right ankle sprain. He only missed a few days of work due to this injury. Appellant filed an occupational disease claim on October 9, 1994 alleging that he collapsed on August 31, 1994 due to injuries to his back, neck, knee, hip and ankle as a result of using his walker crutch at work. He stopped work on September 1, 1994 and submitted compensation claims for lost wages. Appellant's attending physician, Dr. Ray Foster, diagnosed reflex sympathetic dystrophy, although Dr. Maninder Arora, a Board-certified neurologist, who subsequently conducted a second opinion evaluation of appellant, disagreed with this diagnosis. He was later evaluated by Dr. Mazin Sabri, a Board-certified orthopedic surgeon, who agreed with Dr. Foster that appellant suffered from reflex sympathetic dystrophy. The Office merged the Form CA-2 claim with the previously accepted claims and acknowledged that the conflict in the medical evidence required resolution.¹

¹ The Office subsequently referred appellant to for a referee examination to determine whether he suffered from

By decision dated November 15, 1995, the Office denied appellant's claims for monetary compensation for the period September 2 through December 13, 1994 and on January 8, 1996, appellant requested reconsideration.

By decision dated January 30, 1996, the Office denied modification of the prior decision after a merit review. The Office did modify factual errors contained in the November 15, 1995 decision to the extent that appellant had not returned to work at any time and that light duty continued to be available to him.

The employing establishment subsequently offered appellant a limited-duty position as a modified distribution clerk for four hours per day, based upon medical restrictions outlined by Dr. A. Kareem Jaffer, a Board-certified neurologist, in a work restriction evaluation form dated August 7, 1997. Dr. Jaffer indicated that appellant could perform work duties with his upper extremities from his wheelchair in a low traffic area to protect his right leg and foot. He stated that appellant could not be exposed to extreme cold, operate foot controls or motor vehicles. The job description outlined duties including processing return-to-sender mail, writing up second notices on accountable mail and processing mail to verify forwarding addresses. The description also indicated that appellant would perform such duties from his wheelchair in a low traffic area and that transportation to and from work would be provided. On November 14, 1997 the Office informed appellant that the modified position was found suitable and that if he refused such work that he would not be entitled to compensation. The Office afforded appellant 30 days to accept the modified position. He refused the position in a letter dated November 24, 1997 and provided his reasons for declining the position. Appellant cited that he had insomnia; incontinence; extreme sensitivity to cold pressure; lack of control in traffic while driving and distress that someone might bump into his right leg for declining the position. The Office informed appellant by letter dated December 12, 1997 that his reasons for refusing the position were not justified and that he had fifteen days to report to work. Appellant failed to report to work.

By decision dated December 30, 1997, the Office terminated appellant's compensation finding that he refused an offer of suitable light duty.² The Office found no medical evidence that appellant's insomnia or incontinence rendered him totally disabled or evidence that the proposed position would expose him to cold temperatures. The Office determined that, according to the modified job description, appellant would be assigned to a low traffic area in order to protect his right leg and foot and that he would be provided transportation to and from work so that he would not be a traffic hazard. The Office concluded that appellant had not provided sufficient justification for his refusal of the offered position.

Appellant, through his representative requested reconsideration of the December 30, 1997 decision on July 24, 1998 and submitted additional evidence. He submitted a letter from

reflex sympathetic dystrophy due to employment factors. Upon determination that appellant had in fact suffered from reflex sympathetic dystrophy as a result of his employment, the Office accepted the work-related condition and placed appellant on the periodic rolls retroactive from September 2, 1994.

² The Board notes that appellant's entitlement to medical care for the accepted work-related condition has continued.

Dr. Subbsarayan Krishnan, a Board-certified internist, dated April 14, 1998 who opined that appellant should consider medical retirement due to his chronic problem of reflex sympathetic dystrophy that was prone to flare ups and could not be cured. Appellant also submitted a prescription note from Dr. Krishnan that indicated appellant was excused from duty as of April 15, 1998. He submitted a medical report from Dr. Jaffer dated April 24, 1998 who outlined his course of treatment of appellant since February 19, 1997 and discussed appellant's condition of reflex sympathetic dystrophy diagnosed in 1993, which he determined had been unchanged. Dr. Jaffer related that appellant had stopped work on September 1, 1994 and had been rendered permanently disabled. He opined at the time of his evaluation that appellant's condition had worsened over a year's time to the extent that he was not able to perform any job duties.

By decision dated August 3, 1998, the Office denied modification or its prior decision. In an accompanying memorandum, the Office found that although Dr. Krishnan in his April 14, 1998 letter recommended that appellant retire for medical reasons, he did not specifically address whether appellant could perform the duties of the light-duty position offered by appellant's employing establishment for four hours per day. The Office also found that while Dr. Krishnan's prescription note excused him from duty as of April 15, 1998, it did not address the issue of whether appellant was able to perform the duties of the light-duty position in December 1997. It further found that appellant's claim that Dr. Jaffer's conclusion that he could return to work was based on incomplete examination, was not supported by medical reports dated November 10, 1994 and February 19, 1997 in which Dr. Jaffer specifically addressed his examination of appellant's lower extremity. The Office also found that Dr. Jaffer, who opined in his letter dated April 24, 1998 that appellant's condition had worsened and that he was unable to perform any job duties did not indicate that his previous opinion that appellant could perform light-duty work was in error. The Office stated that decisions terminating compensation should not be modified even if claimant's condition deteriorates and that the evidence indicated that appellant's condition had worsened since the December 30, 1997 decision.

Appellant requested reconsideration on September 14, 1998 and resubmitted Dr. Jaffer's medical report of April 24, 1998. By decision dated September 23, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence was found to be immaterial and of a repetitious nature and insufficient to warrant review of the prior decision.

The Board finds that the Office properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that he refused suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.³ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of

³ 5 U.S.C. § 8106(c)(2).

establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.⁴ To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.⁵

The Office met its burden of proof in this case. Dr. Jaffer, appellant's treating physician determined on August 7, 1997 that appellant could work four hours per day within specified work restrictions. In compliance with appellant's medical restrictions, the employing establishment outlined sedentary duties that appellant would perform from his wheelchair in a low-traffic area and offered him transportation to and from work. Appellant, however, declined to accept the position or return to work. An employee who refuses or neglects to work after suitable work has been offered to him must show that such refusal to work was justified.⁶ He argued that he declined the job offer due to insomnia; incontinence; extreme sensitivity to cold pressure; lack of control in traffic while driving and distress that someone might bump into his right leg. Appellant did not submit any medical evidence, prior to the termination of his compensation that substantiated his allegations of inability to perform the position due to these conditions. The Office reviewed his reasons for declining the job offer and determined that they were not justified, as the proposed duties outlined in the job offer complied with each of his medical restrictions.

Although Dr. Jaffer's April 24, 1998 report supported that appellant could no longer perform any work duties and Dr. Krishnan's prescription note excused appellant from duty after April 15, 1998, neither document addressed appellant's ability to perform the duties of the offered position as of November 24, 1997, the date appellant refused the position. Moreover, Dr. Jaffer's report did not alter his earlier opinion of August 7, 1997 that appellant was capable of performing sedentary duties from his wheelchair, which led to his approval of the position in November 1997. Although Dr. Krishnan recommended disability retirement for appellant, the Board notes that the Act does not provide a disability retirement program and that such an opinion does not support that appellant is rendered totally disabled under the Act for all employment, as of the date the Office terminated his benefits.⁷ As the Office obtained medical evidence that appellant could perform sedentary employment four hours per day, and structured the suitable work position within the physical restrictions provided by appellant's physician, and as the Office met the procedural requirements of a suitable work termination, the Office met its burden of proof in this case.

⁴ *Frank J. Sell*, 34 ECAB 547 (1983).

⁵ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁶ 20 C.F.R. § 10.124.

⁷ *See James L. Sutton*, 32 ECAB 1886 (1981) (A determination of disability under civil service retirement provisions has no application under the FECA, as even though an employee is unable to perform the duties of the position he held when injured, which is considered disabled for disability retirement purposes, he is not totally disabled under the FECA if he has the capacity to perform duties of another position for which he is qualified); *see also Earl L. Swanson*, 29 ECAB 707 (1978).

The Board further finds that the Office did not abuse its discretion in this case by denying merit review on September 23, 1998.

The Office's regulations at 20 C.F.R. §10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁸

Appellant did not attempt to show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or fact not previously considered by the Office, but rather he submitted a medical report previously of record. In determining what is relevant and pertinent evidence not previously considered by the Office, the Board has held that evidence which does not address the particular issue involved or evidence which is repetitive or cumulative of that already in the record does not constitute new relevant and pertinent evidence and is therefore not a basis for reopening a case.⁹ Dr. Jaffer's April 24, 1998 report, wherein he opined that appellant's condition had worsened to the extent that he was unable to return to employment, was previously submitted and considered by the Office prior to its August 3, 1998 decision. The Board therefore finds that this evidence is repetitive and does not constitute relevant evidence.¹⁰

⁸ 20 C.F.R. §10.138(b)(2); *Norman W. Hanson*

⁹ *James E. Salvatore*, 42 ECAB 309 (1991).

¹⁰ Additional evidence has been submitted since the Office's September 23, 1998 decision. As the Office did not consider this evidence in reaching a final decision, the Board may not consider it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated September 23 and August 3, 1998 are affirmed.

Dated, Washington, DC
October 10, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member